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95-2077

Supreme Court, U.S.
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No. 95-

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1995

OSCAR GONZALEZ, Sheriff, Val Verde County, Texas,
and
BILL MCGEE, Sheriff, Forrest County, Mississippi,
Cross-Petitioners/Respondents

v.

UNITED STATES OF AMERICA,
Cross-Respondent/Petitioner

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

CONDITIONAL CROSS-PETITION FOR A WRIT OF CERTIORARI

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56 pp

QUESTIONS PRESENTED

1. Whether Congress has power under the U.S. Constitution, Article I, §8 and the Tenth Amendment, as interpreted in *New York v. United States*, 505 U.S. 144 (1992), to command chief law enforcement officers (CLEOs) of the States: to search records and to ascertain whether persons may lawfully purchase handguns; to destroy records concerning purchasers; and to explain adverse legal determinations, as mandated by the Brady Act, 18 U.S.C. §922(s)(2), (6)(B) and (C).

2. Whether the above unconstitutional duties are severable from §922(s)(1). More particularly, whether, given Congress' purpose of preventing the registration of firearm owners, the duty of a firearms dealer to provide notice to the CLEO of a proposed handgun transfer is severable from the duty of the CLEO to destroy such records; whether the CLEO's duty to search records and ascertain the legality of a transfer is severable from the duty of the dealer to allow 5 days to elapse after such notice before making the transfer; and whether, given Congress' due process concerns, the CLEO's duty to explain his finding that a transfer is prohibited is severable from the CLEO's power to prohibit a transfer.

PARTIES TO PROCEEDING

The parties to the proceeding in the Court of Appeals were Sheriff J.R. Koog, Sheriff Bill McGee, and the United States. There are no parent companies and nonwholly owned subsidiaries to be listed.

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CONDITIONAL CROSS-PETITION
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OPINIONS BELOW

The opinion of the United States Court of Appeals is reported as *Koog/McGee v. United States,* 79 F.3d 452 (5th Cir. 1996) and is reproduced in the Appendix ("App.") to the Petition for a Writ of Certiorari at 1a. The opinions of the United States District Court are reported as *Koog v. United States,* 852 F.Supp. 1376 (W.D.Tex. 1994) (App. 29a) and *McGee v. United States,* 863 F.Supp. 321 (S.D.Miss. 1994) (App. 60a).

JURISDICTION

On March 21, 1996, the Court of Appeals affirmed

the judgment of the district court in *McGee* and reversed the judgment of the district court in *Koog*. It declared 18 U.S.C. §922(s)(2), (6)(B) and (C) unconstitutional and upheld the remainder of §922(s) as severable. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(l). This is a conditional cross-petition for certiorari pursuant to Rule 12.5, Rules of the U.S. Supreme Court.

STATUTE

The text of the following statute is reproduced in the Appendix to this Cross-Petition:

> Brady Handgun Violence Protection Act, Pub. L. 103-159, 107 Stat. 1536 (1993), Sec. 101 through 106.

STATEMENT OF THE CASE

(i) Proceedings in the Courts Below

Cross-Petitioners are chief law enforcement officers (CLEOs) commanded by 18 U.S.C. §922(s) to administer federal law related to handgun transactions. The complaints in both cases sought a declaratory judgment that those provisions are inconsistent with Article I, §8 of the Constitution and the Tenth Amendment, and that the remainder of §922(s) is void because it is not severable from the unconstitutional provisions.

In *McGee v. United States*, 863 F.Supp. 321 (S.D.Miss. 1994) (App. 60a, 71-72a), the court held that the

duty to search records and ascertain the legality of a handgun transfer is unconstitutional, but that the remaining portions of §922(s) are severable and thus valid. *Koog/McGee v. United States*, 852 F.Supp. 1376 (W.D.Tex. 1994) (App. 29a) upheld that validity of the commands to CLEOs and thus never reached the severability issue.

The cases were consolidated on appeal. The Fifth Circuit held that the commands to CLEOs were unconstitutional as beyond Congress' powers under Article I, §8 of the Constitution and thus prohibited by the Tenth Amendment. However, the Court found that the remaining portions of §922(s) are severable and hence valid. *Koog v. United States*, 79 F.3d 452 (5th Cir. 1996) (App. 1a, 25-28a.)

(ii) Facts

Sheriff Bill McGee is the chief law enforcement officer of Forrest County, Mississippi. The office of sheriff is created by Miss. Const., Article V, §135. Miss. Code §19-25-67 provides:

> It shall be the duty of every sheriff to keep the peace within his county . . . . It shall be his duty to quell riots, routs, affrays and unlawful assemblages, and to prevent lynchings and mob violence, and wherever necessary he shall call to his aid the power of the county. . . . He shall pursue, apprehend, and commit to jail all persons charged with treason, felony, or other crimes.

Sheriff McGee has 45 deputies, and at any given time

6 are on street patrol and 5 work in the jail complex. The Sheriff is responsible for law enforcement for 68,314 persons in an area of 469 square miles. Sheriff McGee stated:

> Between the necessity of responding to actual calls, administration of and running the jail and housing the inmates, 18 U.S.C. Section 922(s) is an undue burden to my office and my administration as Sheriff, as well as my responsibility to law enforcement in Forrest County, Mississippi. If I am now compelled to perform background checks of our residents, it will have to be done by pulling the deputies off patrol. . . . It would mean a reduction in law enforcement protection as well as the other administrative duties which by statute I am required to carry out, as well as maintaining the housed inmates of Forrest County . . . . (McGee Dec., No. 6, in Record Excerpts, Tab 7.)

Sheriff J.R. Koog is the chief law enforcement officer of Val Verde County, Texas.[1] Texas Const., Article 5, §23 provides for an elected sheriff for each county. Texas Code of Crim. Proc. art. 2.17 describes a sheriff's duties as follows:

> Each sheriff shall be a conservator of the peace in his county, and shall arrest all offenders against the laws of the State, in his view or hearing, and take them before the proper court for examination or trial. He shall quell and suppress all assaults and

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[1] While not in the record, Sheriff Koog has retired and has been replaced by Sheriff Oscar Gonzalez, who is successor to Sheriff Koog both in office and in this litigation.

> batteries, affrays, insurrections and unlawful assemblies. He shall apprehend and commit to jail all offenders, until an examination or trial can be had.

Sheriff Koog has one chief deputy and eleven deputies who serve a county of 55,000 persons and 3241 square miles. The department averages two deputies on patrol at any given moment for this entire area. Sheriff Koog stated:

> I have no additional personnel to assign the tasks required by 18 U.S.C. Section 922(s). To perform background checks on our residents, I will have to take deputy sheriffs off patrol and from regularly assigned law enforcement duties in order to perform this task. For the citizens of Val Verde County, this means a reduction in law enforcement protection. (Koog Aff., Record Excerpts tab 6, ¶7)

ARGUMENT

THE WRIT SHOULD BE GRANTED BECAUSE THIS COURT HAS ALREADY GRANTED A WRIT OF CERTIORARI IN ANOTHER CASE TO DETERMINE WHETHER CONGRESS MAY CONSCRIPT LOCAL LAW ENFORCEMENT OFFICERS TO ADMINISTER THE BRADY ACT, AND THIS COURT SHOULD ALSO DECIDE WHETHER OTHER PORTIONS OF THE ACT ARE SEVERABLE, AN IMPORTANT QUESTION OF FEDERAL LAW WHICH THE FIFTH CIRCUIT DECIDED CONTRARY TO THIS COURT'S PRECEDENTS.

This Court has already granted a Writ of Certiorari to

determine whether the Brady Act's commands to law enforcement are constitutional. *Printz v. United States, cert. granted,* No. 95-1478 (June 17, 1996) and *Mack v. United States, cert. granted,* No. 95-1503 (June 17, 1996) (consolidated). The decision being reviewed in those cases, *Mack v. United States,* 66 F.3d 1025 (1995), did not reach the issue of severability since it upheld the validity of the commands to law enforcement. This Court may or may not consider the severability issue in the *Printz/Mack* case. If this Court holds that the commands to CLEOs are unconstitutional but does not reach the severability issue, then that issue could only be resolved on remand with unnecessary litigation.

Cross-Petitioners concur with the position of the United States that this Court should grant a writ of certiorari here. However, Cross-Petitioners disagree with the position of the United States that the petition in this case should be held pending the decision in *Printz/Mack.* Instead, the better course would be to consolidate this case with *Printz/Mack.*

The three unconstitutional duties imposed by the Brady Act are not severable from the rest of §922(s). The statute will not, absent the unconstitutional duties, operate in a manner consistent with the intent of Congress. The statutory text and legislative history demonstrate the mandatory character of the duties, without which Congress would not have enacted the statute.

In particular, §922(s)(1), including its notice requirement, 5-day waiting period, and CLEO veto power would not have been enacted had a criminal record check for handgun purchasers not been required; had there not been a

requirement that CLEOs destroy records on lawful purchasers to protect privacy and preclude the registration of firearms owners; and had there not been a due process requirement that the CLEO inform a rejected purchaser of the reason. Accordingly, the above provisions of §922(s)(1) are not severable and are entirely void.

I. Absent a Duty to Check Records, the Waiting Period Serves no Purpose

§922(s)(1)(A)(i) makes it unlawful for a federally licensed firearms dealer to transfer a handgun to a non-licensee unless the dealer obtains a statement containing personal information from the transferee, and then provides notice of the contents, and transmits a copy, of the statement to the CLEO where the transferee resides. §922(s)(1)(A)(ii) provides further that the dealer may not transfer the handgun unless:

> (I) 5 business days . . . have elapsed from the date the transferor furnished notice of the contents of the statement to the chief law enforcement officer, during which period the transferor has not received information from the chief law enforcement officer that receipt or possession of the handgun by the transferee would be in violation of Federal, State, or local law; or
>
> (II) the transferor has received notice from the chief law enforcement officer that the officer has no information indicating that receipt or possession of the handgun by the transferee would violate Federal, State, or local law . . . .

These alternative requirements are inexorably tied to the unconstitutional duty imposed by §922(s)(2), which provides:

> A chief law enforcement officer to whom a transferor has provided notice . . . *shall make a reasonable effort to ascertain within 5 business days* whether receipt or possession would be in violation of the law, *including research* in whatever State and local recordkeeping systems are available and in a national system designated by the Attorney General. (Emphasis added.)

It is plain from the face of the statute that the only purpose of the 5 day waiting period is to allow the CLEO to fulfill his duty to check records pursuant to §922(s)(2). The waiting period is a maximum, not a mandatory, time period and is an alternative to earlier approval under §922(s)(1)(A)(ii)(II), which allows the transfer as soon as the transferor is notified by the CLEO that the transfer is lawful.

That the waiting period has no purpose other that the required (and unconstitutional) recordchecking by CLEOs is further clarified by §922(s)(1)(C), which allows anyone with a State firearm permit to purchase a handgun immediately, and §922(s)(1)(D), which exempts the entire population of a State which has its own instant check.[2] Moreover, the

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[2] The Bureau of Alcohol, Tobacco and Firearms has determined that there are 24 States where the waiting period does not apply. 59 F.R. 37534 (July 22, 1994). Those states encompass approximately 58% of the U.S. population.

waiting period provision expires in 60 months or when the national instant criminal background check system is established, whichever comes first. §922(s)(1), (t)(1). Thus, striking the duty of CLEOs to check records under §922(s)(2) destroys the entire purpose of the waiting period and the requirement that a dealer provide notice to the CLEO.

Even without a duty to do so, CLEOs still have the option of checking records. Yet notice to the CLEO of the transferee's statement without a duty to check would not meet the statutory purpose. The Brady bill was defeated in Congress for several years when it was drafted to mandate a waiting period and to make the record check optional. It passed only when it was revised to mandate a record check and to allow avoidance of a waiting period. By severing the duty to check records, §922(s)(2), and leaving the waiting period, §922(s)(1), the law is transformed into a mandatory, not a maximum, 5 day waiting period, exactly what proponents said it was not to be.

House Judiciary Committee Report 103-344 (1993) clarifies the mandatory character of the duty to determine legality and the nonseverability of this duty from the waiting period: "Local law enforcement officials are required to use the waiting period to determine whether a prospective handgun purchaser has a felony conviction or is otherwise prohibited by law from buying a gun." *Id.* at 7.

The Additional Dissenting Views of Rep. Schiff in the Report stated:

> My final amendment proposed to make the

> performance of the background check an option, rather than a requirement, for state and local law enforcement agencies, while keeping the waiting period. Currently in the bill, a state or local law enforcement agency "shall make a reasonable effort to" check the backgrounds of prospective handgun purchasers within five days. My amendment would strike the above and insert "may," thus making it an option for state and local agencies who do have the law enforcement resources to perform the background check, to do so. . . . This amendment failed as well. *Id.* at 39.

Rep. Schumer, chief sponsor of the Brady bill, opposed Schiff's proposal because localities or States "wouldn't do the check . . . it makes it a much better bill . . . to say that they 'shall' have to do it." Transcript of Markup on H.R. 1025, House Judiciary Committee, Nov. 4, 1993, at 131. Rep. Sensenbrenner, chief Republican sponsor, opposed the amendment because "it makes the Brady bill optional. . . . We should make it mandatory." *Id.* at 134.

The chief sponsors also stated that the sole purpose of the waiting period is to allow the mandatory background checks to be conducted. Rep. Schumer averred: "The Brady bill . . . is not supposed to be a national cooling off period." *Id.* at 101. Rep. Sensenbrenner reiterated: "The purpose of the waiting period is to give law enforcement a chance to find out if a felon or an illegal alien or an adjudicated mental incompetent is able to buy a firearm or not." *Id.* at 104.

On the House floor, Rep. Schiff raised his proposal to "permit a state or local law enforcement agency to perform the criminal history background check, rather than compel

such state to do so." Rep. Schiff commented:

> H.R. 1045 . . . is not the same Brady bill that the House voted on in the last Congress under the designation of H.R. 7. There was a significant change made in terms of making this bill today an unfunded mandate on the local police departments in this country.
>
> H.R. 7 in the last Congress addressed this issue as follows: "Paragraph 1"--that is the background check--"shall not be interpreted to require any action by a chief law enforcement officer which is not otherwise required." . . . The language in this bill has Congress requiring local police departments to take their time and their resources to make a background check without Federal support. CONG.REC. H9093 (Nov. 10, 1993).[3]

Rep. Schiff requested a vote on his proposal "to remove the mandate. Keep the 5-day waiting period, but not requiring the local police to do the check." *Id.* at H9094. Rep. Hughes responded that "the mandatory requirement is the right requirement." *Id.* at H9095. A vote on the Rep. Schiff's amendment was blocked.

The waiting period would not have been adopted without the mandatory check. Rep. Zimmer explained:

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[3] House Judiciary Committee Report 102-47, at 12 (1991), which accompanied H.R. 7, confirmed: "No duty is created for the chief of police. This paragraph provides that subsection (q)(1) requires no action be taken by the chief that is not already required." "The bill would not require such investigations . . . ." *Id.* at 15.

> Two years ago I voted against an earlier version of the Brady bill, which required a 7-day waiting period for handgun purchases with only an optional background check. I voted instead for affirmative legislation that provided for an instant, mandatory background check . . . .
>
> The legislation we are voting on today addresses my principal objections to the 1991 Brady bill. The background check is no longer optional and the waiting period will be eliminated as soon as a national instant check system can be implemented. *Id.* at H9107-08.

Senator Jeffords stated that without required background checks, the bill should not pass:

> I do not believe that Brady bill waiting periods should be established prior to handgun purchases unless accurate background checks can be made. Thus, I am not here supporting waiting periods without background checks. 139 CONG.REC. S16416 (Nov. 19, 1993).

Invalidation of the required checks without invalidation of the waiting period leaves the Act in exactly the form in which it could not pass and to which the above members of Congress objected. A mandatory wait and an optional check failed; an optional wait and mandatory check passed. This Court should not allow the version that failed to become the law.

II. The Record Destruction Requirement, which was Intended to Prevent the Registration of Gun Owners, is Not Severable from the Notice Requirement

Striking the unconstitutional command that the CLEO destroy records on the handgun purchaser without also striking the requirement that the dealer provide notice of the handgun transferee's statement to the CLEO rewrites the Act in a form in which Congress would not have enacted. Congress has consistently rejected proposals to allow registration of handgun owners.

§922(s)(1)(A)(i) requires a handgun purchaser to make a statement including name, address, and date of birth, and requires that the dealer may not transfer the handgun unless the dealer has:

> (III) within 1 day after the transferee furnishes the statement, provided notice of the contents of the statement to the chief law enforcement officer of the place of residence of the transferee; and
>
> (IV) within 1 day after the transferee furnishes the statement, transmitted a copy of the statement to the chief law enforcement officer of the place of residence of the transferee . . . .

This requirement would have never passed Congress absent the unconstitutional duty imposed by §922(s)(6)(B), which provides:

> Unless the chief law enforcement officer to whom a statement is transmitted . . . determines that a transaction would violate Federal, State, or local law--(i) the officer *shall, within 20 business days* after the

> date the transferee made the statement on the basis of which the notice was provided, *destroy the statement, any record containing information derived from the statement, and any record created as a result of the notice required* . . . . (Emphasis added.)

Without the duty to destroy records, Congress would not have required a licensee to furnish the purchaser's statement to law enforcement. Rep. Roukema made the record destruction requirement the first feature worthy of mention in attempting to persuade colleagues to vote for the Brady bill:

> First, the Brady bill in no way provides for a system of national gun registration--quite the opposite. In every instance where a handgun sale is approved under Brady, law enforcement officers must destroy the information they've been provided within 20 days. 139 CONG.REC. H9106 (Nov. 10, 1993).

Rep. Manzullo explained: "To help protect the privacy of legal purchasers, it [the bill] requires that a copy of the statement and other records of the transaction be destroyed within 20 days." *Id.* at H9117.

Proponents had long before held out the destruction requirement as a basic premise of the bill. As Senator Metzenbaum stated: "This bill does not call for gun registration. The police, under this legislation, must destroy the firearms form within 30 days." S.Hrg. 101-1161, 101st Cong., 1st Sess., at 12 (1991).

The Brady Act also enacted an almost identical provision requiring the reporting of multiple handgun sales to State and local police and the destruction of those records within 20 days. 18 U.S.C. §923(g)(3). This destruction requirement, Senator Dole explained, "eliminates the concern that this would be back door gun registration." 139 CONG.REC. S16311 (Nov. 19, 1993).

Just as the interim provisions of the Act require CLEOs to destroy records, the permanent provisions requires the same, explicitly declaring the objective of preventing a system of registration of firearm owners. §103(i) of P.L. 103-159 provides about the national instant check system which will replace the interim provisions:

> PROHIBITION RELATING TO ESTABLISHMENT OF REGISTRATION SYSTEMS WITH RESPECT TO FIREARMS.--No department, agency, officer, or employee of the United States may--
>
> (1) require that any record or portion thereof generated by the system established under this section be recorded at or transferred to a facility owned, managed, or controlled by the United States or any State or political subdivision thereof; or
>
> (2) use the system established under this section to establish any system for the registration of firearms, firearm owners, or firearm transactions . . .
>
> .

This destruction requirement was intended to protect

the privacy rights of law-abiding firearms owners in the same manner as they were protected by the Firearms Owners' Protection Act of 1986, which amended §926(a) to restrict the power of the Secretary to prescribe regulations as follows:

> No such rule or regulation . . . may require that records required to be maintained under this chapter or any portion of the contents of such records, be recorded at or transferred to a facility owned, managed, or controlled by the United States or any State or any political subdivision thereof, nor that any system of registration of firearms, firearms owners, or firearms transactions or dispositions be established.

In debates on the Firearms Owners' Protection Act, Senator McClure explained:

> The central compromise of the Gun Control Act of 1968--the *sine qua non* for the entry of the Federal Government into any form of firearms regulation was this: Records concerning gun ownership would be maintained by dealers, not by the Federal Government and not by State and local governments. 131 CONG.REC. S9163-64 (July 9, 1985).

The record destruction requirement is part of a consistent scheme throughout the Gun Control Act to protect privacy and to prevent the registration of firearms at any governmental level, federal, State, or local. It reflects Congress' historical rejection of the registration of handguns

and other ordinary firearms. As originally proposed in 1934, the National Firearms Act, which requires registration of machineguns (26 U.S.C. §§5841, 5845(a)), would have required registration of pistols, but Congress defeated the proposal.[4] Passage of the Gun Control Act of 1968 coincided with defeat of all proposals to require registration of firearms.[5] Alarmed that BATF was trying to require registration through regulations,[6] Congress has provided in every BATF appropriation act passed since 1978 that "no funds appropriated herein shall be available for administrative expenses in connection with consolidating or centralizing within the Department of the Treasury the records of receipts and disposition of firearms." *E.g.*, P.L. 102-393, 106 Stat. 1731 (1992); *see* P.L. 104-52, 109 Stat. 471 (1995).

The record destruction requirement of the interim provision is an essential element of Congress' historic and comprehensive scheme to protect privacy interests by prohibiting federal, State, and local law enforcement agencies from keeping records on firearms owners. It is a *sine qua non* of §922(s), without which the requirement that dealers provide information to CLEOs would have never passed.

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[4] National Firearms Act: Hearings Before the Committee on Ways and Means, U.S. House of Representatives, 73rd Cong., 2d Sess., 58 (1934).

[5] *See* Federal Firearms Legislation, Hearings before Subcom. to Investigate Juvenile Delinquency, Senate Judiciary Com., 90th Cong., 2d Sess. (1968).

[6] Treasury's Proposed Gun Regulations: Hearings before Subcommittee on Crime, House Judiciary Committee, 95th Cong, 2d Sess. (1979).

Since the record destruction requirement is an unconstitutional imposition on CLEOs, the requirement that dealers provide notice to CLEOs is not severable and is void.

III. Without the Explanation Requirement, which Congress Deemed Essential for Due Process, the Interim Provisions would not have Passed

Finally, §922(s)(1) would not have been enacted without §922(s)(6)(C), which unconstitutionally commands the CLEO to explain why a purchaser was determined to be ineligible to receive a handgun. A dealer may not transfer a handgun if the CLEO sends notice that the receipt of the handgun would violate federal, State, or local law. §922(s)(1)(A)(ii)(II). To ensure due process, §922(s)(6)(C) provides:

> If a chief law enforcement officer determines that an individual is ineligible to receive a handgun and the individual requests the officer to provide the reason for such determination, the officer *shall provide the reasons* to the individual *in writing within 20 business days* after receipt of the request. (Emphasis added.)

Without this provision, a CLEO could arbitrarily veto any or all handgun transfers, even for eligible transferees, and refuse to offer any explanation. Moreover, §925A provides that a person denied a firearm due to erroneous information may bring an action against the State or political subdivision to correct the error. This remedy is not viable without the chief's written explanation stating the reason for the denial.

The duty to explain a denial does not become moot even if the duty to check records and ascertain the lawfulness of a handgun transaction is unconstitutional and thus optional. A CLEO might still carry out the function as a service to constituents, who must otherwise wait 5 days and who may thereby hold the chief politically accountable. The CLEO is subject to the unconstitutional command to write a legal opinion letter if he or she deems a purchaser ineligible.

The Dissenting Views in House Judiciary Committee Report 103-344, at 36 (1993) explain why the duty to disclose reasons for denial is not severable from the CLEO's veto power in §922(s)(1):

> H.R. 1025 contains no system to redress a wrongful denial of purchase. If a person improperly is denied his rights, the only redress is to hire an attorney and go to court to prove he or she is law-abiding. This turns the presumption of innocence, on which our legal system is based, upside down. It allows for arbitrary and capricious misuse of the regulatory process by over-zealous or corrupt government officials, resulting in the denial of basic rights to honest citizens.

The House amended the bill, by a vote of 431 to 2, to require that the CLEO provide the reason for a denial. CONG.REC. H99122 (Nov. 10, 1993). As Rep. Towns explained, "the bill opens the door to corrupting influences where local officials could deny any individual the right to purchase a firearm or decide to ban firearms within the whole community for virtually any reason." *Id.* at H9111. Rep.

Hoekstra added:

> I support the Brady bill, with the Ramstad amendment that will guarantee the second amendment rights of citizens by requiring law enforcement officials to provide written documentation for any denials that might be rendered. Such a guarantee is essential so that individuals who are denied permission to purchase a gun might be given a written explanation which they may use in the event that they appeal the decision in Federal Court. *Id.*

Judiciary Committee Chairman Brooks stressed why it was deemed imperative that chiefs be required to explain denials:

> Each person in this country has a right to due process of law. Yet, as this bill is written, a person can be denied the right to make a lawful handgun purchase--without any cause, and without any explanation.
>
> What could be more fundamental to due process than to require the Government to tell you why you cannot exercise a right that is being exercised by others every day? *Id.* at H9122.

Given that the unconstitutional duty to explain a denial was deemed necessary to guarantee due process, this duty is not severable from the requirement of the dealer to provide notice and the prohibition on transfer of a handgun should the dealer receive an adverse determination from the CLEO. Congress would not have enacted the interim provisions in a form which would have allowed arbitrary

denials with no duty to explain why.

IV. The Fifth Circuit's Decision is Contrary to This Court's Precedents Concerning Severability

The Fifth Circuit failed correctly to apply this Court's rules concerning severability. *New York v. United States*, 505 U.S. 144, 112 S.Ct. at 2434 (1992) explains the rule as follows:

> The standard for determining the severability of an unconstitutional provision is well established: Unless it is evident that the Legislature would not have enacted those provisions which are within its power, independently of that which is not, the invalid part may be dropped if what is left is fully operative as a law.

Regarding whether striking part of a law leaves it fully operative, this test is passed only if "its elimination in no way alters the substantive reach of the statute and leaves completely unchanged its basic operation." *United States v. Jackson*, 390 U.S. 570, 586 (1968). The provisions are not severable if they are not "functionally independent," i.e., the "valid and invalid provisions [are] so intertwined that the Court would have to rewrite the law to allow it to stand." *Alaska Airlines v. Brock*, 480 U.S. 678, 684 (1987).

Even if the law is fully operative, it must be asked whether Congress would have enacted the valid provisions without the invalid provisions. "The relevant inquiry is whether the statute will function in a *manner* consistent with the intent of Congress." *Id.* at 685.

The interim provisions of the Brady Act fail both tests. Without the duty to check records, the five-day wait is a useless burden on citizens, who will hold CLEOs politically accountable. Without the duty to destroy records, the notice requirement allows the creation of a system of registration of firearms owners, who will seek retribution against CLEOs at the polls. Without the duty to explain denials, the Act allows arbitrary denials and violation of due process. Congress would never have adopted these impositions without the commands to CLEOs which were intended to protect public safety and guarantee individual rights to privacy and due process, but which were beyond the power of Congress to impose.

The Brady Act has no severability clause. However, as passed in 1968, §928 of Title 18 provides in part: "If any provision of this chapter . . . is held invalid, the remainder of the chapter . . . shall not be affected thereby." The Fifth Circuit concluded that the Act is presumed to be severable because of §928. 79 F.3d at 463 (App. 25-28a). The court believed that the Sheriffs did not provide a "convincing argument" that Congress would not have enacted the other provisions at issue without the commands to CLEOs. *Id.*

The Sheriffs argued that the waiting period serves no purpose without the background check requirement. The court acknowledged that the Act itself provides that the waiting period does not apply in States with instant checks or permit systems and in several other situations, and will be replaced by the national instant check system. "We agree that these exceptions cast doubt on the notion of an independent 'cooling off' period . . . ." *Id.* at 463.

However, because of §928, the court concluded that the waiting period and licensee duties are severable from the

invalid duties. *Id.* The court did not discuss the sheriffs' argument that Congress would not have adopted the Act without a duty to destroy records to prevent a registration scheme, and the duty to explain denials to protect due process.[7]

A separations clause "is an aid merely; not an inexorable command." *Dorchy v. State of Kansas*, 264 U.S. 286, 290 (1924). *See* 2 Sutherland, *Statutory Construction* §44.08 (5th ed. 1992) (severability clause not dispositive).

As with the Brady Act, the law at issue in *Alaska Airlines*, the Airline Deregulation Act (ADA), contained no severability clause.[8] 480 U.S. at 686, n.8. Like the Gun Control Act (GCA), to which the Brady Act was added, the Federal Aviation Act of 1958, to which the ADA was added, "does contain such a clause."[9] *Id.* Despite the severability clause in the Federal Aviation Act, this Court concluded that

> the applicability of this clause to §43 [of the ADA, the Employee Protection Program (EPP)] is in doubt, however, because, unlike many sections of the

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[7] The Fifth Circuit stated that the sheriffs, in arguing that the Act is not severable, focused on Congress' intent regarding the waiting period. 79 F.3d at 462-3. However, the sheriffs paid considerable attention to the arguments that Congress would not have passed the Act without the record destruction requirement and the duty to explain a denial. Brief of Appellants Koog & McGee at 39-41, 44-46; Reply Brief at 22-25.

[8] The Airline Deregulation Act was "codified at various sections of Title 49 U.S.C. App." 480 U.S. at 680.

[9] That clause states: "If any provision of this Act . . . is held invalid, the remainder of the Act . . . shall not be affected thereby." §1504, P.L. 85-726.

> Deregulation Act, the EPP does not amend provisions of the Aviation Act or any other pre-existing statute, but instead establishes a new program. *Id.*

This Court used the word "amend" to refer to the insertion of new wording in existing provisions, in contrast to "a new program" which adds something major to the statute that did not exist before. The EPP did not remove or insert any new words within existing sentences or paragraphs, but instead created a wholly new section within Title 49 U.S.C. App.

Similarly, §922(s) did not "amend" the GCA in this sense because, like the EPP, it did not remove or insert new words within any existing sentences or paragraphs. Instead, like the enactment of the EPP, §922(s) added "a new program." Thus, the applicability of the severability clause of the GCA to the Brady Act "is in doubt."[10]

Even applicable to the Brady Act, §928 states only that, if a provision of "this chapter" is invalid, "the remainder of the chapter" is not affected. The "chapter" is Chapter 44 of Title 18, §921 through §930. By using the word "chapter," as distinguished from "subsection" or "section"--words used throughout Chapter 44--Congress sought to preclude the invalidation of a subsection, or even an entire section, within Chapter 44 leading to the entire *chapter* being

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[10] With the exception of the reference to "this Act," as distinguished from "this chapter," the pertinent part of the severability clause of the Federal Aviation Act is identical to the severability clause of the GCA, a distinction without a difference.

invalidated. This does not suggest that, if a paragraph of a subsection within Chapter 44 is invalid, that the remainder of that *subsection* is automatically to be preserved.

In *Leavitt v. Jane*, No. 95-1242, 1996 U.S. LEXIS 3885; 64 U.S.L.W. 3834 (June 17, 1996), this Court reversed a decision that a State would not want to regulate abortion 20 weeks after gestation if it could not regulate it 20 weeks before gestation. In a severability clause radically different than §928--but of a type more consistent with the Fifth Circuit's erroneous analysis here--the legislature provided:

> If any one or more provision, section, subsection, sentence, clause, phrase or word of this part or the application thereof to any person or circumstance is found to be unconstitutional, the same is hereby declared to be severable and the balance of this part shall remain effective notwithstanding such unconstitutionality. The legislature hereby declares that it would have passed this part, and each provision, section, subsection, sentence, clause, phrase or word thereof, irrespective of the fact that any one or more provision, section, subsection, sentence, clause, phrase, or word be declared unconstitutional. 1996 U.S. Lexis 3885, at *6.

As this Court found, the legislature could not have been clearer. This Court continued:

> The two sections at issue here are not "interrelated" in any relevant sense--i.e., in the sense of being so interdependent that the remainder of the statute cannot function effectively without the invalidated provision, or in the sense that the

> invalidated provision could be regarded as part of a legislative compromise, extracted in exchange for the inclusion of other provisions of the statute. *Id.* at *7.

The provisions at issue here are certainly "interrelated" in the above senses. Besides the disruption of the effective functioning of the Brady Act caused by the invalidation of the commands to CLEOs, "the invalidated provision could be regarded as part of a legislative compromise, extracted in exchange for the inclusion of other provisions of the statute." The record-destruction requirement was the compromise for allowing handgun transactions to be reported to CLEOs. The mandatory check was the compromise for allowing up to five days wait.[11] The explanation requirement was the compromise for giving CLEOs veto power over handgun sales.

This Court in *Leavitt* found it inconceivable that the legislature would not have wanted to regulate any abortions just because it could not regulate some abortions. *Id.* at *9. Put simply, "The relevant question is whether the legislature would prefer not to have B if it could not have A as well." *Id.* at *11.

That situation is wholly absent here. Here, the commands to law enforcement are wholly invalid. It is not a question of the background check/ascertainment requirement, the record destruction requirement, or the

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[11] Senator Kohl stated that he supported "time to cool off" in "an ideal world," but added that the Brady bill "is not a perfect piece of legislation: It is a compromise. . . . The bill before us today represents the best deal we could make to get the votes we need." 139 CONG.REC. S16332 (Nov. 19, 1993). In other words, the bill would not have passed in its old form--an optional check with a mandatory wait.

explanation requirement being valid in some situations and not others. Those commands to the States are unconstitutional on their face. The question then is whether the law remains operative and whether Congress would have passed the law without those duties. As is clear, the answer is in the negative: Congress wanted no waiting period without background checks; wanted no notice to CLEOs without the destruction requirement; and wanted no CLEO veto over handgun sales without the duty to explain a denial.

Applying the above standards, the provisions of §922(s) are not severable, and the provisions of §922(s)(1) identified above are void. The Fifth Circuit decided the severability issue here in a manner which conflicts with this Court's precedents.

CONCLUSION

This Court should grant a writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit. Furthermore, this case should be consolidated with *Printz v. United States*, *cert. granted*, No. 95-1478 (June 17, 1996) and *Mack v. United States*, *cert. granted*, No. 95-1503 (June 17, 1996).

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APPENDIX

STATUTE

107 STAT. 1536 (Nov. 30, 1993)

PUBLIC LAW 103-159
103d Congress

An Act

To provide for a waiting period before the purchase of a handgun, and for the establishment of a national instant criminal background check system to be contacted by firearms dealers before the transfer of any firearm.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

TITLE I--BRADY HANDGUN CONTROL

SEC. 101.--SHORT TITLE.

This title may be cited as the "Brady Handgun Violence Prevention Act".

SEC. 102. FEDERAL FIREARMS LICENSEE REQUIRED TO CONDUCT CRIMINAL BACKGROUND CHECK BEFORE TRANSFER OF FIREARM TO NON-LICENSEE.

(a) INTERIM PROVISION.--

(1) IN GENERAL.--Section 922 of title 18, United States Code, is amended by adding at the end the following:

"(s)(1) Beginning on the date that is 90 days after the date of enactment of this subsection and ending on the day

before the date that is 60 months after such date of enactment, it shall be unlawful for any licensed importer, licensed manufacturer, or licensed dealer to sell, deliver, or transfer a handgun to an individual who is not licensed under section 923, unless--

"(A) after the most recent proposal of such transfer by the transferee--

"(i) the transferor has--

"(I) received from the transferee a statement of the transferee containing the information described in paragraph (3);

"(II) verified the identity of the transferee by examining the identification document presented;

"(III) within 1 day after the transferee furnishes the statement, provided notice of the contents of the statement to the chief law enforcement officer of the place of residence of the transferee; and

"(IV) within 1 day after the transferee furnishes the statement, transmitted a copy of the statement to the chief law enforcement officer of the plaee of residence of the transferee; and

"(ii)(I) 5 business days (meaning days on which State offices are open) have elapsed from the date the transferor furnished notice of the contents of the statement to the chief law enforcement officer, during which period the transferor has not received information from the chief law

enforcement officer that receipt or possession of the handgun by the transferee would be in violation of Federal, State, or local law; or

"(II) the transferor has received notice from the chief law enforcement officer that the officer has no information indicating that receipt or possession of the handgun by the transferee would violate Federal, State, or local law;

"(B) the transferee has presented to the transferor a written statement, issued by the chief law enforcement officer of the place of residence of the transferee during the 10-day period ending on the date of the most recent proposal of such transfer by the transferee, stating that the transferee requires access to a handgun because of a threat to the life of the transferee or of any member of the household of the transferee;

"(C)(i) the transferee has presented to the transferor a permit that--

"(I) allows the transferee to possess or acquire a handgun; and

"(II) was issued not more than 5 years earlier by the State in which the transfer is to take place; and

"(ii) the law of the State provides that such a permit is to be issued only after an authorized government official has verified that the information available to such official does not indicate that possession of a handgun by the transferee would be in violation of the law;

"(D) the law of the State requires that, before any

licensed importer, licensed manufacturer, or licensed dealer completes the transfer of a handgun to an individual who is not licensed under section 923, an authorized government official verify that the information available to such official does not indicate that possession of a handgun by the transferee would be in violation of law;

"(E) the Secretary has approved the transfer under section 5812 of the Internal Revenue Code of 1986; or

"(F) on application of the transferor, the Secretary has certified that compliance with subparagraph (A)(i)(III) is impracticable because–

"(i) the ratio of the number of law enforcement officers of the State in which the transfer is to occur to the number of square miles of land area of the State does not exceed 0.0025;

"(ii) the business premises of the transferor at which the transfer is to occur are extremely remote in relation to the chief law enforcement officer; and

"(iii) there is an absence of telecommunications facilities in the geographical area in which the business premises are located.

"(2) A chief law enforcement officer to whom a transferor has provided notice pursuant to paragraph (1)(A)(i)(III) shall make a reasonable effort to ascertain within 5 business days whether receipt or possession would be in violation of the law, including research in whatever State and local recordkeeping systems are available and in a national system designated by the Attorney General.

"(3) The statement referred to in paragraph (1)(A)(i)(I) shall contain only--

"(A) the name, address, and date of birth appearing on a valid identification document (as defined in section 1028(d)(1)) of the transferee containing a photograph of the transferee and a description of the identification used;

"(B) a statement that the transferee--

"(i) is not under indictment for, and has not been convicted in any court of, a crime punishable by imprisonment for a term exceeding 1 year;

"(ii) is not a fugitive from justice;

"(iii) is not an unlawful user of or addicted to any controlled substance (as defined in section 102 of the Controlled Substances Act);

"(iv) has not been adjudicated as a mental defective or been committed to a mental institution;

"(v) is not an alien who is illegally or unlawfully in the United States;

"(vi) has not been discharged from the Armed Forces under dishonorable conditions; and

"(vii) is not a person who, having been a citizen of the United States, has renounced such citizenship;

"(C) the date the statement is made; and

"(D) notice that the transferee intends to obtain a handgun from the transferor.

"(4) Any transferor of a handgun who, after such transfer, receives a report from a chief law enforcement officer containing information that receipt or possession of the handgun by the transferee violates Federal, State, or local law shall, within 1 business day after receipt of such request, communicate any information related to the transfer that the transferor has about the transfer and the transferee to--

"(A) the chief law enforcement officer of the place of business of the transferor; and

"(B) the chief law enforcement officer of the place of residence of the transferee.

"(5) Any transferor who receives information, not otherwise available to the public, in a report under this subsection shall not disclose such information except to the transferee, to law enforcement authorities, or pursuant to the direction of a court of law.

"(6)(A) Any transferor who sells, delivers, or otherwise transfers a handgun to a transferee shall retain the copy of the statement of the transferee with respect to the handgun transaction, and shall retain evidence that the transferor has complied with subclauses (III) and (IV) of paragraph (1)(A)(i) with respect to the statement.

"(B) Unless the chief law enforcement officer to whom a statement is transmitted under paragraph (1)(A)(i)(IV) determines that a transaction would violate Federal, State, or local law--

"(i) the officer shall, within 20 business days after the date the transferee made the statement on the basis of which the notice was provided, destroy the statement, any

record containing information derived from the statement, and any record created as a result of the notice required by paragraph (1)(A)(i)(III);

"(ii) the information contained in the statement shall not be conveyed to any person except a person who has a need to know in order to carry out this subsection; and

"(iii) the information contained in the statement shall not be used for any purpose other than to carry out this subsection.

"(C) If a chief law enforcement officer determines that an individual is ineligible to receive a handgun and the individual requests the officer to provide the reason for such determination, the officer shall provide such reasons to the individual in writing within 20 business days after receipt of the request.

"(7) A chief law enforcement officer or other person responsible for providing criminal history background information pursuant to this subsection shall not be liable in an action at law for damages--

"(A) for failure to prevent the sale or transfer of a handgun to a person whose receipt or possession of the handgun is unlawful under this section; or

"(B) for preventing such a sale or transfer to a person who may lawfully receive or possess a handgun.

"(8) For purposes of this subsection, the term 'chief law enforcement officer' means the chief of police, the sheriff, or an equivalent officer or the designee of any such

individual.

"(9) The Secretary shall take necessary actions to ensure that the provisions of this subsection are published and disseminated to licensed dealers, law enforcement officials, and the public.".

(2) HANDGUN DEFINED.--Section 921(a) of title 18, United States Code, is amended by adding at the end the following:

"(29) The term 'handgun' means--

"(A) a firearm which has a short stock and is designed to be held and fired by the use of a single hand; and

"(B) any combination of parts from which a firearm described in subparagraph (A) can be assembled.".

(b) PERMANENT PROVISION.--Section 922 of title 18, United States Code, as amended by subsection (a)(1), is amended by adding at the end the following:

"(t)(1) Beginning on the date that is 30 days after the Attorney General notifies licensees under section 103(d) of the Brady Handgun Violence Prevention Act that the national instant criminal background check system is established, a licensed importer, licensed manufacturer, or licensed dealer shall not transfer a firearm to any other person who is not licensed under this chapter, unless--

"(A) before the completion of the transfer, the licensee contacts the national instant criminal background check system established under section 103 of that Act;

"(B)(i) the system provides the licensee with a unique identification number; or

"(ii) 3 business days (meaning a day on which State offices are open) have elapsed since the licensee contacted the system, and the system has not notified the licensee that the receipt of a firearm by such other person would violate subsection (g) or (n) of this section; and

"(C) the transferor has verified the identity of the transferee by examining a valid identification document (as defined in section 1028(d)(1) of this title) of the transferee containing a photograph of the transferee.

"(2) If receipt of a firearm would not violate section 922 (g) or (n) or State law, the system shall--

"(A) assign a unique identification number to the transfer;

"(B) provide the licensee with the number; and

"(C) destroy all records of the system with respect to the call (other than the identifying number and the date the number was assigned) and all records of the system relating to the person or the transfer.

"(3) Paragraph (1) shall not apply to a firearm transfer between a licensee and another person if--

"(A)(i) such other person has presented to the licensee a permit that--

"(I) allows such other person to possess or acquire a firearm; and

"(II) was issued not more than 5 years earlier by the State in which the transfer is to take place; and

"(ii) the law of the State provides that such a permit is to be issued only after an authorized government official has verified that the information available to such official does not indicate that possession of a firearm by such other person would be in violation of law;

"(B) the Secretary has approved the transfer under section 5812 of the Internal Revenue Code of 1986; or

"(C) on application of the transferor, the Secretary has certified that compliance with paragraph (1)(A) is impracticable because--

"(i) the ratio of the number of law enforcement officers of the State in which the transfer is to occur to the number of square miles of land area of the State does not exceed 0.0025;

"(ii) the business premises of the licensee at which the transfer is to occur are extremely remote in relation to the chief law enforcement officer (as defined in subsection (s)(8)); and

"(iii) there is an absence of telecommunications facilities in the geographical area in which the business premises are located.

"(4) If the national instant criminal background check system notifies the licensee that the information available to the system does not demonstrate that the receipt of a firearm by such other person would violate subsection (g) or (n) or State law, and the licensee transfers a firearm to such other

person, the licensee shall include in the record of the transfer the unique identification number provided by the system with respect to the transfer.

"(5) If the licensee knowingly transfers a firearm to such other person and knowingly fails to comply with paragraph (1) of this subsection with respect to the transfer and, at the time such other person most recently proposed the transfer, the national instant criminal background check system was operating and information was available to the system demonstrating that receipt of a firearm by such other person would violate subsection (g) or (n) of this section or State law, the Secretary may, after notice and opportunity for a hearing, suspend for not more than 6 months or revoke any license issued to the licensee under section 923, and may impose on the licensee a civil fine of not more than $5,000.

"(6) Neither a local government nor an employee of the Federal Government or of any State or local government, responsible for providing information to the national instant criminal background check system shall be liable in an action at law for damages--

"(A) for failure to prevent the sale or transfer of a firearm to a person whose receipt or possession of the firearm is unlawful under this section; or

"(B) for preventing such a sale or transfer to a person who may lawfully receive or possess a firearm.".

(c) PENALTY.--Section 924(a) of title 18, United States Code, is amended--

(1) in paragraph (1), by striking "paragraph (2) or (3) of"; and

(2) by adding at the end the following:

"(5) Whoever knowingly violates subsection (s) or (t) of section 922 shall be fined not more than $1,000, imprisoned for not more than 1 year, or both.".

SEC. 103. NATIONAL INSTANT CRIMINAL BACKGROUND CHECK SYSTEM.

(a) DETERMINATION OF TIMETABLES .--Not later than 6 months after the date of enactment of this Act, the Attorney General shall--

(1) determine the type of computer hardware and software that will be used to operate the national instant criminal background check system and the means by which State criminal records systems and the telephone or electronic device of licensees will communicate with the national system;

(2) investigate the criminal records system of each State and determine for each State a timetable by which the State should be able to provide criminal records on an on-line capacity basis to the national system; and

(3) notify each State of the determinations made pursuant to paragraphs (1) and (2).

(b) ESTABLISHMENT OF SYSTEM.--Not later than 60 months after the date of the enactment of this Act, the Attorney General shall establish a national instant criminal background check system that any licensee may contact, by telephone or by other electronic means in addition to the

telephone, for information, to be supplied immediately, on whether receipt of a firearm by a prospective transferee would violate section 922 of title 18, United States Code, or State law.

(c) EXPEDITED ACTION BY THE ATTORNEY GENERAL.--The Attorney General shall expedite--

(1) the upgrading and indexing of State criminal history records in the Federal criminal records system maintained by the Federal Bureau of Investigation;

(2) the development of hardware and software systems to link State criminal history check systems into the national instant criminal background check system established by the Attorney General pursuant to this section; and

(3) the current revitalization initiatives by the Federal Bureau of Investigation for technologically advanced fingerprint and criminal records identification.

(d) NOTIFICATION OF LICENSEES.--On establishment of the system under this section, the Attorney General shall notify each licensee and the chief law enforcement officer of each State of the existence and purpose of the system and the means to be used to contact the system.

(e) ADMINISTRATIVE PROVISIONS.--

(1) AUTHORITY TO OBTAIN OFFICIAL INFORMATION.--Notwithstanding any other law, the Attorney General may secure directly from any department or agency of the United States such information on persons for whom receipt of a firearm would violate subsection (g) or (n) of section 922 of title 18, United States Code or State law, as

is necessary to enable the system to operate in accordance with this section. On request of the Attorney General, the head of such department or agency shall furnish such information to the system.

(2) OTHER AUTHORITY.--The Attorney General shall develop such computer software, design and obtain such telecommunications and computer hardware, and employ such personnel, as are necessary to establish and operate the system in accordance with this section.

(f) WRITTEN REASONS PROVIDED ON REQUEST.--If the national instant criminal background check system determines that an individual is ineligible to receive a firearm and the individual requests the system to provide the reasons for the determination, the system shall provide such reasons to the individual, in writing, within 5 business days after the date of the request.

(g) CORRECTION OF ERRONEOUS SYSTEM INFORMATION.--If the system established under this section informs an individual contacting the system that receipt of a firearm by a prospective transferee would violate subsection (g) or (n) of section 922 of title 18, United States Code or State law, the prospective transferee may request the Attorney General to provide the prospective transferee with the reasons therefor. Upon receipt of such a request, the Attorney General shall immediately comply with the request. The prospective transferee may submit to the Attorney General information to correct, clarify, or supplement records of the system with respect to the prospective transferee. After receipt of such information, the Attorney General shall immediately consider the information, investigate the matter further, and correct all erroneous Federal records relating to the prospective transferee and give notice of the error to any

Federal department or agency or any State that was the source of such erroneous records.

(h) REGULATIONS.--After 90 days' notice to the public and an opportunity for hearing by interested parties, the Attorney General shall prescribe regulations to ensure the privacy and security of the information of the system established under this section.

(i) PROHIBITION RELATING TO ESTABLISHMENT OF REGISTRATION SYSTEMS WITH RESPECT TO FIREARMS.--No department, agency, officer, or employee of the United States may--

(1) require that any record or portion thereof generated by the system established under this section be recorded at or transferred to a facility owned, managed, or controlled by the United States or any State or political subdivision thereof; or

(2) use the system established under this section to establish any system for the registration of firearms, firearm owners, or firearm transactions or dispositions, except with respect to persons, prohibited by section 922 (g) or (n) of title 18, United States Code or State law, from receiving a firearm.

(j) DEFINITIONS.--As used in this section:

(1) LICENSEE.--The term "licensee" means a licensed importer (as defined in section 921(a)(9) of title 18, United States Code), a licensed manufacturer (as defined in section 921(a)(10) of that title), or a licensed dealer (as defined in section 921(a)(11) of that title).

(2) OTHER TERMS.--The terms "firearm", "handgun", "licensed importer", "licensed manufacturer", and "licensed dealer" have the meanings stated in section 921(a) of title 18, United States Code, as amended by subsection (a)(2).

(k) AUTHORIZATION OF APPROPRIATIONS.--There are authorized to be appropriated, which may be appropriated from the Violent Crime Reduction Trust Fund established by section 1115 of title 31, United States Code, such sums as are necessary to enable the Attorney General to carry out this section.

SEC. 104. REMEDY FOR ERRONEOUS DENIAL OF FIREARM.

(a) IN GENERAL.--Chapter 44 of title 18, United States Code, is amended by inserting after section 925 the following new section:

"§ 925A. Remedy for erroneous denial of firearm

"Any person denied a firearm pursuant to subsection (s) or (t) of section 922--

"(1) due to the provision of erroneous information relating to the person by any State or political subdivision thereof, or by the national instant criminal background check system established under section 103 of the Brady Handgun Violence Prevention Act; or

"(2) who was not prohibited from receipt of a firearm pursuant to subsection (g) or (n) of section 922,

may bring an action against the State or political subdivision responsible for providing the erroneous information, or

responsible for denying the transfer, or against the United States, as the case may be, for an order directing that the erroneous information be corrected or that the transfer be approved, as the case may be. In any action under this section, the court, in its discretion, may allow the prevailing party a reasonable attorney's fee as part of the costs.".

(b) TECHNICAL AMENDMENT.--The chapter analysis for chapter 44 of title 18, United States Code, is amended by inserting after the item relating to section 925 the following new item:

"925A. Remedy for erroneous denial of firearm.".

SEC. 105. RULE OF CONSTRUCTION.

This Act and the amendments made by this Act shall not be construed to alter or impair any right or remedy under section 552a of title 5, United States Code.

SEC. 106. FUNDING FOR IMPROVEMENT OF CRIMINAL RECORDS.

(a) USE OF FORMULA GRANTS.--Section 509(b) of title I of the Omnibus Crime Control and Safe Streets Act of 1968 (42 U.S.C. 3759(b)) is amended--

(1) in paragraph (2) by striking "and" after the semicolon;

(2) in paragraph (3) by striking the period and inserting "; and"; and

(3) by adding at the end the following new paragraph:

"(4) the improvement of State record systems and the sharing with the Attorney General of all of the records described in paragraphs (1), (2), and (3) of this subsection and the records required by the Attorney General under section 103 of the Brady Handgun Violence Prevention Act, for the purpose of implementing that Act.".

(b) ADDITIONAL FUNDING.–

(1) GRANTS FOR THE IMPROVEMENT OF CRIMINAL RECORDS.--The Attorney General, through the Bureau of Justice Statistics, shall, subject to appropriations and with preference to States that as of the date of enactment of this Act have the lowest percent currency of case dispositions in computerized criminal history files, make a grant to each State to be used–

(A) for the creation of a computerized criminal history record system or improvement of an existing system;

(B) to improve accessibility to the national instant criminal background system; and

(C) upon establishment of the national system, to assist the State in the transmittal of criminal records to the national system.

(2) AUTHORIZATION OF APPROPRIATIONS.–There are authorized to be appropriated for grants under paragraph (1), which may be appropriated from the Violent Crime Reduction Trust Fund established by section 1115 of title 31, United States Code, a total of $200,000,000 for fiscal year 1994 and all fiscal years thereafter.

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No. 95-2077

In the Supreme Court of the United States

OCTOBER TERM, 1995

J.R. KOOG, SHERIFF, VAL VERDE COUNTY, TEXAS, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES

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QUESTION PRESENTED

The Brady Handgun Violence Prevention Act, 18 U.S.C. 922(s), provides, *inter alia*, that, within five business days of a firearms dealer's proposal to transfer a handgun, the "chief law enforcement officer" (CLEO) (the chief of police or sheriff) of the transferee's residence shall make a "reasonable effort" to ascertain whether the transferee's receipt or possession of the handgun would be in violation of the law. Under the Act, the dealer may not make the transfer until five business days have elapsed after he provides such notice to the CLEO, unless the CLEO earlier informs the dealer that there is no legal impediment to the transfer. The Act also requires that the CLEO shall, upon request, provide the would-be purchaser with a written explanation of reasons for a conclusion that the transfer would be unlawful, and shall destroy records relating to the transfer upon a conclusion that no legal impediment to a handgun sale exists.

The question presented by the cross-petition is whether, if the Act's background-check, explanation, or record-destruction requirement violates the Tenth Amendment, that requirement is severable from the rest of the Act, including its provision for a five-day waiting period.

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BRIEF FOR THE UNITED STATES

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1. On June 17, 1996, this Court granted the petitions for a writ of certiorari in *Printz* v. *United States*, No. 95-1478, and *Mack* v. *United States*, No. 95-1503. The question presented in those cases is whether the Brady Handgun Violence Prevention Act (Brady Act), 18 U.S.C. 922(s), contravenes the Tenth Amendment by requiring local chief law enforcement officers (CLEOs) to (a) make a "reasonable effort" within five business days to determine whether a proposed handgun transfer would violate the law; (b) provide a would-be handgun purchaser with a written explanation of reasons for the CLEO's conclusion that the transfer would be unlawful; and (c) destroy records relating to the transfer upon a conclusion

that no legal impediment to a handgun sale exists. On June 19, 1996, we filed a petition for a writ of certiorari in this case (No. 95-2052), seeking review of the Fifth Circuit's decision that those provisions are unconstitutional. We explain that the question presented in our petition is the same as the question presented in *Printz* and *Mack*, and we suggest that the Court hold our petition pending the decision in *Printz* and *Mack*. See 95-2052 Pet. 8.

The cross-petitioners agree that this case warrants review, but they ask that it be set for oral argument and consolidated with *Printz* and *Mack*. Cross-petitioners argue that the cases should be consolidated to ensure that this Court decides whether the provisions of the Brady Act challenged in *Printz* and *Mack* are severable from the remainder of the Act, especially the Act's five-day waiting period for transfers of handguns by federal firearms dealers. They contend that Congress would not have enacted the five-day waiting period without also requiring CLEOs to conduct a background check during those five days. Cross-Pet. 7-12. They also argue that the record-destruction and notice requirements are not severable from each other, or from the requirement that CLEOs make a reasonable effort to determine whether a handgun transfer would be illegal. *Id.* at 13-21.

2. The severability of the five-day waiting period from the interim duties imposed on CLEOs, including the reasonable-effort requirement, may not be properly before the Court in *Printz* and *Mack*, or in this case. The five-day waiting period is a duty imposed on firearms dealers, not CLEOs. See 18 U.S.C. 922(s)(1)(A)(ii)(I). Accordingly, cross-petitioners (who, like the petitioners in *Printz* and *Mack*, are

CLEOs, not firearms dealers) may lack standing to challenge the five-day waiting period because it does not affect them.

On the other hand, cross-petitioners, like the petitioners in *Printz* and *Mack*, have challenged three interim duties imposed on them by the Brady Act as violative of the Tenth Amendment, and have contended that those interim duties are not severable *from each other*. If the Court upholds all of the challenged provisions of the Brady Act in *Printz* and *Mack*, there will be no need to reach that severability question. But if the Court invalidates any of those three provisions, the Court may reach that question of severability. See *New York* v. *United States*, 505 U.S. 144, 186-187 (1992). Moreover, in this case, the court of appeals, which struck down all of the interim duties imposed on CLEOs (see 95-2052 Pet. App. 25a), considered the severability of the five-day waiting period as well, and held that it is severable from the interim duties (*id.* at 25a-28a).

Because this Court may reach the question of severability in *Printz* and *Mack*, we suggest that the Court hold the cross-petition (along with our petition) in this case pending the Court's decision in those cases. Consolidation of this case with *Printz* and *Mack* is not necessary, however, because the issues presented in this case will be fully briefed in *Printz* and *Mack*. There is every reason to expect that petitioners in *Printz* and *Mack* will present the question of severability in their briefs on the merits.*

* * * * *

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* Counsel for cross-petitioners in this case also represents Sheriff Printz.

For the foregoing reasons, the cross-petition for a writ of certiorari should be held pending the decision in *Printz* v. *United States*, cert. granted, No. 95-1478 (June 17, 1996), and *Mack* v. *United States*, cert. granted, No. 95-1503 (June 17, 1996), and then disposed of as appropriate in light of the decision in those cases.

Respectfully submitted.

WALTER DELLINGER
Acting Solicitor General

JULY 1996

Supreme Court, U.S.
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(3)

No. 95-2077

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1995

OSCAR GONZALEZ, Sheriff, Val Verde County, Texas,
and
BILL MCGEE, Sheriff, Forrest County, Mississippi,
Petitioners

v.

UNITED STATES OF AMERICA,
Respondent

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

REPLY BRIEF FOR THE PETITIONERS

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IN THE
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REPLY BRIEF FOR THE PETITIONERS

Sheriffs J.R. Koog (now succeeded in office by Sheriff Oscar Gonzalez) and Bill McGee, the cross-petitioners, argue that the dealer-to-CLEO notice requirement, the waiting period, and the CLEO veto power are not severable from the unconstitutional commands to CLEOs. The United States suggests that the sheriffs may not have standing to challenge the waiting period "because it does not affect them." (Br. 3.) To the contrary, the sheriffs will be held politically accountable by their constituents who purchase handguns and they may be exposed to lawsuits as a result of the waiting period, the notification requirement, and the veto provision.

Constituents will have to wait the full five business

days to purchase handguns, unless the sheriffs conduct the background checks and notify the dealers that the sale may be consummated. §922(s)(1)(A)(ii)(I) imposes the 5-day wait, but subparagraph (II) waives the wait if the CLEO notifies the dealer that the transfer would not violate the law. Sheriffs who do not accommodate their constituents will suffer at the polls.

The sheriffs will also be held politically accountable and will open themselves to lawsuits by law-abiding handgun purchasers who value their privacy and want the records about their lawful purchases destroyed. As enactment of the destruction requirement itself reflects, handgun purchasers, through the exercise of their political influence, oppose perceived attempts to create any local, State, or federal system of registration of handgun purchasers. Any sheriff who does not destroy the records involuntarily received from dealers will suffer at the polls. Nor is the sheriff immunized from actions at law for damages for violation of privacy rights. *Cf.* 18 U.S.C. §922(s)(7) (CLEO not liable in an action at law for damages for failure to prevent a transfer to an unlawful recipient or for prevention of a transfer to a lawful recipient).

If the sheriffs voluntarily check records as a service to their constituents, they are then faced with the necessity, should an ineligible person be discovered, of informing the dealer and of preparing a legal opinion letter. Any sheriff who vetoes a purchase and then refuses to explain why would be attacked politically. Such a sheriff would also be exposed to being sued under §925A, which provides that any person denied a firearm due to erroneous information

provided by any State or political subdivision thereof "may bring an action against the State or political subdivision responsible for providing the erroneous information, or responsible for denying the transfer." Relief includes an order directing the correction of the erroneous information or "that the transfer be approved" by the CLEO, together with attorney's fees.

Parts of the record bear out the fact that the sheriffs will be held politically accountable for not administering the Brady commands because of the adverse consequences to their constituents from the related Brady Act provisions. Sheriff McGee is the elected sheriff of Forrest County, Mississippi. The entitlement to purchase a handgun is valued by many voters. *See* Miss. Const., Art. III, §12 ("The right of every citizen to keep and bear arms in defense of his home, person, or property, or in aid of the civil power when thereto legally summoned, shall not be called in question"); Miss. Code §45-9-51 ("no county or municipality may adopt any ordinance that restricts or requires the possession, transportation, sale, transfer or ownership of firearms").[1]

There are 75 licensed firearm dealers in Forrest County. (Ex. D, McGee Dec., No. 5, RE, tab 7.) One of them, Big Buck Sports, made 755 handgun transactions the past year, which would average 63 transactions requiring Brady checks per month. (Ex. E, Price Dec., RE tab 9.)

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[1] *See Romero v. United States*, 883 F.Supp. 1076, 1080 (W.D.La. 1995) (Brady Act causes political harm by putting sheriff in middle of conflict between voters who believe Act violates right to bear arms and those who support Act).

Pawn Shop Plus noted an average of 85 handgun transactions per month. (Ex. C, Fisher Dec., RE tab 8.)

At the hearing, Sheriff McGee testified that he had been doing 6 to 8 checks per day. (RE tab 14, at 11.) The NCIC might render as many as 60 to 70 individuals with a common name. (15) Sheriff McGee receives a computer printout listing every person with a certain name or alias and a certain (or similar) date of birth in the United States. (45) A third of the searches result in a detailed response. In some, it must be determined whether a conviction is a misdemeanor or felony. (46) On occasion, the Sheriff has required individuals to come into the office to determine if they were persons identified in the NCIC check. (41)

One search might take between 15 and 30 minutes. (41-42) Searches consume an hour and a half of time per day. (42, 47) No authority exits to charge for the searches. (48-48)

Once he determines that the transfer is lawful, Sheriff McGee destroys the records immediately. (37) He anticipated "repercussions" and "recourse" against him if he did not destroy the records. (27) He believes that he is required to keep the forms for denied persons because he must, within 20 days of a request, explain a denial. (37) A denied person does not have a time limit on when he can make his request. (40) No denials had been made so far. (40-41)

Sheriff Koog (now succeeded by Sheriff Gonzalez) is the elected sheriff of Val Verde County, Texas. The right

to obtain a handgun is a political value of many voters. *See* Tex. Const., Art. 1, § 23 ("Every citizen shall have the right to keep and bear arms in the lawful defense of himself or the State"); Tex. Local Gov't. Code §215.001(a) ("A municipality may not adopt regulations relating to the transfer, private ownership, keeping, transportation, licensing, or registration of firearms").

Sheriff Koog testified at the hearing on April 15, 1994, that "If I were to make a reasonable check under my terms it'd take a week or more, for each check. And it would severely impact my patrol duties . . . ." (RE, tab 11, at 25.) Checks conducted so far by Sheriff Koog were limited to TCIC and NCIC because "I had a deluge of burglaries on the river, and family violence, and you name it. I just don't have the manpower." (28) No funds are available in the budget for the checks. (28)

Koog expected 50 to 100 checks per month to be required. (37) There are 42 registered firearms dealers in Val Verde County. (37) He felt that he must conduct a background check on every person, even personal acquaintances. "My duties as sheriff are to be fair and apply the law equally." (37-38) He elaborated:

> Q. Sheriff Koog, would it smack . . . you as political favoritism if someone came in and wanted to purchase a handgun, and you didn't perform these checks . . . ?
>
> A. If I started that, I bet your boots I wouldn't be in office next year, next term.

> Q. So you're not going to engage in political favoritism on doing . . . background checks for the Brady Bill?
>
> A. They come in with a pistol purchase, they're going to get a check, if I have to do it. (42)

Besides the political damage, Sheriff Koog anticipated potential civil suits by the State Rifle Association or by individuals being checked. (29) Suits could be filed if he enforced the Act and if he did not enforce the Act. (29)

The above illustrates the point of *New York v. United States*, 505 U.S. 144, 112 S.Ct. 2408, 2424 (1992) about the blurring of responsibility:

> Where the Federal Government directs the States to regulate, it may be state officials who will bear the brunt of public disapproval, while the federal officials who devised the regulatory program may remain insulated from the electoral ramifications of their decision. Accountability is thus diminished when, due to federal coercion, elected state officials cannot regulate in accordance with the views of the local electorate . . . .

In the case at bar, the federal mandate leaves the sheriffs holding the bag. Because of the political damage and the exposure to lawsuits caused by the failure to administer the unconstitutional commands, the sheriffs clearly have standing to challenge the waiting period and notification requirements.

The United States suggests that this Court may reach the issue of severability in *Printz* and *Mack*, and thus need not consolidate these cases. It also suggests that petitioners in *Printz* and *Mack* will present the question of severability in their briefs on the merits. (Br. 3.) Nonetheless, consolidation of these cases with *Printz* and *Mack* would be helpful from the viewpoint of illustrating to this Court the facts in these additional cases which provide further proof of the burdensome character of the unconstitutional mandates at issue.

Accordingly, this Court should grant a writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit. Furthermore, this case should be consolidated with *Printz v. United States, cert. granted*, No. 95-1478 (June 17, 1996) and *Mack v. United States, cert. granted*, No. 95-1503 (June 17, 1996).

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